

25

FILED

FEB 8 1945

CHARLES ELMORE GROPLEY  
CLERK

IN THE  
SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 1944

---

No. 930

---

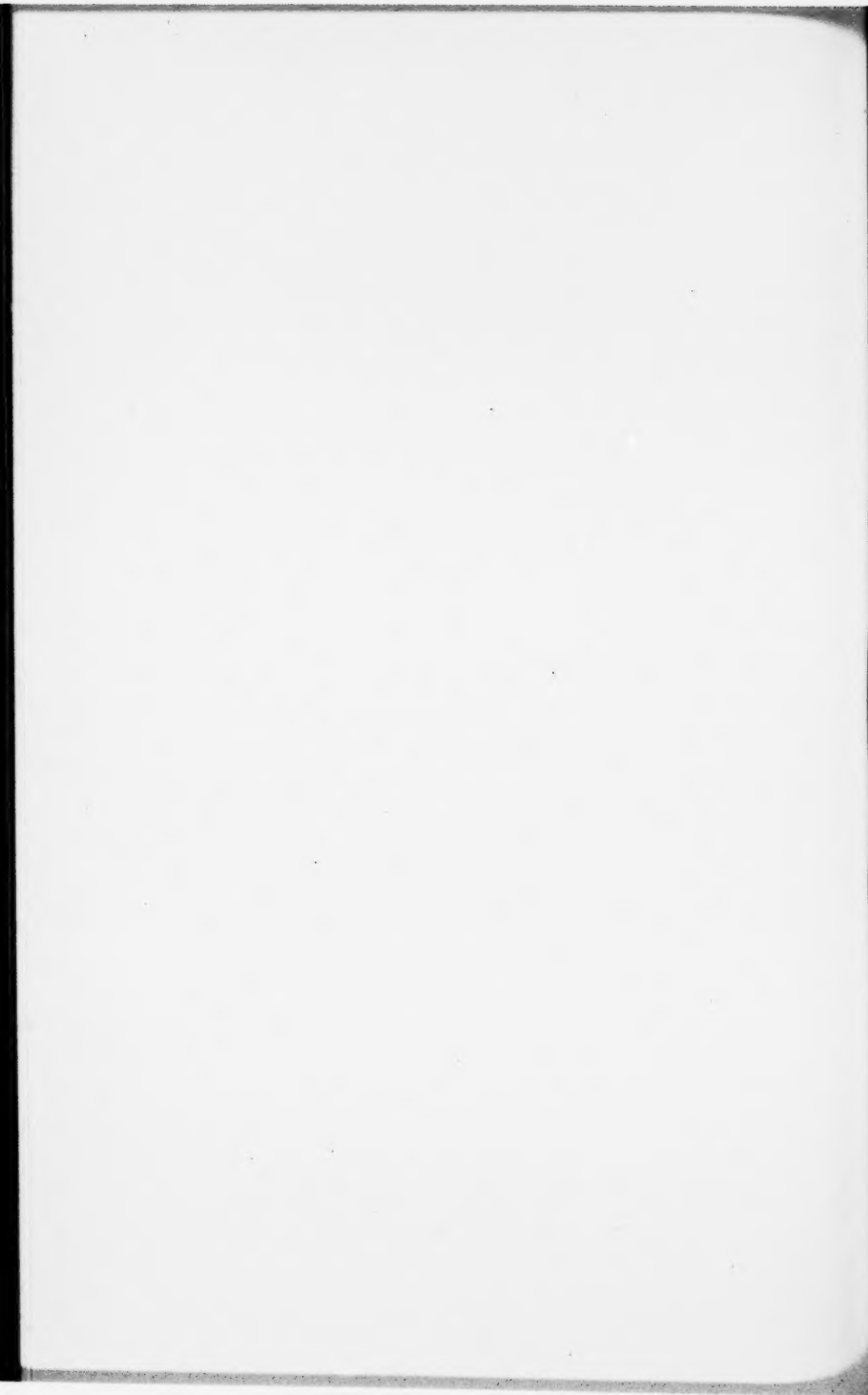
PAUL FRANZ FREDERICK, *Petitioner*,  
v.  
UNITED STATES OF AMERICA, *Respondent*

---

PETITION FOR WRIT OF CERTIORARI  
To the United States Circuit Court of Appeals,  
For the Fifth Circuit,  
AND BRIEF IN SUPPORT THEREOF

---

BERNARD A. GOLDING,  
432 Niels Esperson Bldg.,  
Houston, Texas,  
*Counsel for Petitioner*



## SUBJECT INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI . . . . .	1
Statement . . . . .	1
Jurisdiction . . . . .	6
Opinion of the Court Below . . . . .	6
Questions Presented . . . . .	8
Reasons Relied Upon for the Allowance of the Writ	8
Prayer . . . . .	10
 BRIEF IN SUPPORT OF PETITION FOR WRIT OF CER-	
TIORARI . . . . .	11
Opinion of the Court . . . . .	11
Statement of the Case . . . . .	11
Specifications of Error . . . . .	12
Summary of Argument . . . . .	13
Argument . . . . .	14
Point I . . . . .	14
Point II . . . . .	15
Point III . . . . .	20
Conclusion . . . . .	22

## LIST OF AUTHORITIES

	PAGE
Benn v. U. S. (9 Cir.), 21 Fed. (2d) 962 .....	9
Boatright v. U. S. (7 Cir.), 105 Fed. (2d) 737 .....	18
Fasula v. U. S., 272 U.S. 620, 629 .....	20
Fotie v. U. S. (8 Cir.), 137 Fed. (2d) 831 .....	9, 18, 21
Judicial Code, Title 8, Section 746, Subdivision 18 .....	14
Judicial Code, Section 240, Subdivision (A), as amended by Act of February 13, 1925, Title 28, Sec- tion 347 (A), U. S. Code .....	6
Rivera v. U. S. (1 Cir.), 57 Fed. (2d) 816 .....	18
Spies v. U. S., 317 U.S. 492, 497, 498 .....	20
U. S. v. Classic, et al., 313 U.S. 299 .....	9, 18, 21
U. S. v. Murdock, 290 U.S. 389, 394 .....	20
U. S. v. Silva (2 Cir.), 109 Fed. (2d) 531 .....	18
Warszower v. U. S., 312 U.S. 342 .....	9, 18

### REVISED CIVIL STATUTES OF TEXAS (1925)

Articles 2959-2977 .....	15
Article 7046 .....	15

IN THE  
SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM, 1944

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

PAUL FRANZ FREDERICK, *Petitioner*,  
v.  
UNITED STATES OF AMERICA, *Respondent*

\_\_\_\_\_  
**PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

*To the Honorable Chief Justice of the United States and the  
Associate Justices of the Supreme Court of the United  
States:*

Petitioner, Paul Franz Frederick, respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review a Judgment of that Court entered on December 13th, 1944, convicting Petitioner of a violation of Subdivision 18, Sec. 746, Title 8, U. S. C. A., Naturalization Act of 1940.

A Petition for Rehearing was denied on January 15th, 1945.

**Statement**

Petitioner lawfully entered the United States on November 14th, 1923, and has resided continually in this country. He

is married to an American born lady, and has four children of this marital union attending the Public Schools in Houston, Texas. At the time of the return of the first indictment, he was employed as a tool designer at Hughes Tool Company, Houston, Texas, where he had been so employed for about eight years (R. 137). Being a property owner in the City of Houston, State of Texas, and having rendered the same for tax purposes, he was required, under the Constitution and Statutes of the State of Texas, to purchase and pay for a Poll Tax, the payment of which is evidenced by a poll tax receipt (Arts. 2959-2977, 7046, VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS ANNOTATED). In December, 1941, Petitioner, as he was required to do, purchased a poll tax for his wife and himself (R. 148, 149).

In January, 1943, Petitioner presented himself to the immigration authorities in Houston, Texas, with a view of securing his final naturalization papers (R. 166); having married a lady born in the United States, it was <sup>NOT</sup> necessary for him to secure his first papers.

On March 15th, 1943, Petitioner was indicted on two counts:

- (a) Falsely representing himself to be a citizen of the United States, before a Deputy Assessor of Taxes of Harris County, Texas, in applying for a POLL TAX;
- (b) Falsely representing himself to be a citizen of the United States, before an Election Judge of Precinct No. 1, of Harris County, Texas, in applying for a ballot to vote (R. 3-5).

This cause was tried before JUDGE T. M. KENNERLY (a jury having been waived), on June 24th, 1943. Petitioner was found guilty on the First Count, and acquitted on the Second Count (50 F. Supp. 769).

The Trial Court granted Petitioner a new trial upon the basis of the following letter from the Government's principal witness at this and the succeeding prosecution:

"Dear Judge Kennerly:

"My testimony having convicted Mr. Frederick leaves me in a most unhappy state. I was told that they had a lot of other things against him, when actually, as far as I have learned, they did not produce one new thing against him. I was under the impression he was a real enemy alien. What I testified was true, but had I not been disillusioned about it, I could have confined my testimony to answering the questions asked me.

*"I believe Mr. Frederick is innocent for this reason: I have checked the old records and find that every year Mr. Frederick would render his property and attach one (only) Poll Tax to the rendition, that being for his wife. I fully believe, after talking to Mrs. Kaser and one of his neighbors that he had talked with someone who had convinced him that being a property owner, he was entitled to vote in the water election down there. I know it would be easy to get confused about the rules and laws, for one like him.*

"I have a boy in the navy, and I sincerely hope that if he ever finds himself in enemy territory he won't be treated so harshly, for one slight step.

"Your Honor, I would like for you to consider this: On his 1941 inventory, he rendered one poll tax for his wife, but through error it was left off the roll and off his tax notice. Had this not happened, it might have led to a different outcome of things.

*"Then I didn't have him swear to anything. It is a fact that many deputies selling poll taxes would sell a man a poll tax if he said he had his first papers.*

"I listen to your (Sunday School) class every Sunday morning (on the radio), and I know you are as anxious as I am to help him, if there is a way. Rather than make an example out of him, for there are many others who have repeated the same offense, let's let this be the be-

ginning of more strict regulations in writing and obtaining poll taxes and in writing the reports and poll lists, something I have always hoped to see. For 14 years I have worked, kept house and supported and reared my children, deserted by my husband. Please help me; I can not do this to Mrs. Frederick and her three children. (Emphasis supplied.)

Very sincerely,  
Mrs. Bennita Blissard."

On September 9th, 1943, Petitioner was again indicted, the charge being that he "unlawfully represented himself to be a citizen of the United States of America in applying to an Election Judge at Price's Service Station for a ballot to vote in an election for School Trustee \* \* \* " (R. 5-6).

Upon the second trial (both causes being consolidated), a jury having been waived, the Trial Court (JUDGE HANNAY) found Petitioner guilty on Count I of the previous indictment (8534) and guilty on the Count as charged in the latter indictment (8690); and sentenced him to sixty days in an institution designated by the Attorney General (R. 23).

Petitioner contends that the Government failed to prove *beyond a reasonable doubt* that for the purpose of voting in a local School Board Trustee election for the Clover Leaf Addition, an addition to the City of Houston, Texas, he falsely represented himself as a citizen of the United States.

Petitioner further contended that proof of his having secured a Poll Tax, and presenting himself to vote in an election for School Trustees, without more, was insufficient to sustain the burden imposed upon the Government.

Petitioner's contention that there was no relevant proof that he violated the Statute in question, or any other law, requires an analysis of the evidence. As to this the Circuit Court of Appeals said that "the evidence leaves us with more dubiety than certainty \* \* \* ."

The only evidence as to the procuring of the Poll Tax re-

ceipt was that of witness Mrs. Blissard. She testified that she asked Petitioner if he was naturalized, and that Petitioner answered in the affirmative (R. 46). Later on in her testimony (R. 210) the same witness stated that people were "ten or twelve feet deep at the windows and there are about fifteen windows there, you can imagine how noisy it is." This witness said, "At this point I didn't say, are you a naturalized citizen of the United States. I merely raised my eyes and said, 'You are naturalized?' and he said 'Yes.'" But in response to the next question this witness says that when she asked him the question "you are naturalized?" \* \* \* "he nodded his head."

Witness Kiser (R. 195) testified that she has known Petitioner eight years, and knows that he "has difficulty in hearing at times, due to some impediment in his hearing. He is not entirely deaf, but he has great difficulty in hearing." This apparent deafness is quite obvious in the record. During the course of the trial, he does not hear his attorney's questions, and has to have them repeated (R. 136, 140, 145).

The only evidence as to Petitioner presenting himself, at a voting place in the local School Trusteeship Election, was that of Mrs. Blevins. She testified that Petitioner was at the voting place on the occasion in question. Nobody else saw Petitioner there. Petitioner says that he "doesn't recall" but that his wife says he was there (R. 154, 156). Witness Blevins and Petitioner were on opposite sides in a bitter neighborhood election squabble (R. 178-179; 74). There is no evidence whatever, except Mrs. Blevins' word, that Frederick appeared at the polls and presented his poll tax receipt. The Poll Tax showing he voted was never presented in evidence; and there is no evidence except this witness' word that he actually did appear to vote at this election.

Nowhere in the record is there any evidence of anybody stating that Petitioner ever represented himself as a citizen

of the United States. Witness Marks (R. 96-97) did state that Petitioner told him (Marks) that he (Petitioner) was a citizen, and exhibited a Poll Tax receipt to prove it. But this was alleged to have occurred April 3rd, 1941, and the first Poll Tax Petitioner ever bought, as the Government admits, was December 27th, 1941. The Government has carefully avoided the Marks' testimony, for obviously such witness is mistaken. Many witnesses testified that Petitioner has always told them he was *not* a citizen. Petitioner registered as an alien December 5th, 1940 (Cf. insert R. 83) and as an enemy alien February 12, 1942 (R. 90-91).

Petitioner contended that the burden to establish that he knowingly and falsely claimed citizenship and that he had represented himself as a citizen unlawfully, was upon the Government, and not upon him. Further, that the competent evidence in this cause utterly failed to meet the burden imposed upon the Government.

The Circuit Court of Appeals, although holding that this cause amounted to "a witch hunt," and "the evidence leaves us with more dubiety than certainty \* \* \*," affirmed the judgment of the Trial Court.

### **Jurisdiction**

This Court has jurisdiction under JUDICIAL CODE, Section 240, Subdivision (A), as amended by the Act of February 13th, 1925, Title 28, Section 347 (A), U. S. Code.

### **Opinion of the Court Below**

The opinion of the Circuit Court of Appeals for the Fifth Circuit has not been officially reported. It appears at pages 214-215 of the Record. Since the opinion is extremely short, we take the liberty of quoting the entire opinion at this point:

"OPINION OF THE COURT—FILED—December 13, 1944  
IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

—  
No. 11018  
—

Paul Franz Frederick, Appellant,  
versus  
United States of America

—  
Appeal From the District Court of the United States  
for the Southern District of Texas

—  
(December 13, 1944)  
—

Before HUTCHESON, WALLER AND LEE,  
Circuit Judges.

WALLER, Circuit Judge: Appellant, a German alien, was convicted of falsely representing himself to be a citizen of the United States in applying for a poll tax receipt and in applying for a ballot to vote.

The case is suggestive of a witch hunt, and even though the evidence leaves us with more dubiety than certainty we are unable to say that the verdict of the <sup>judge acting</sup> ~~jury was~~ in the absence of a jury, which was waived, was not supported by sufficient evidence to sustain it, nor can we say that it is contrary to law.

The fact that the judge who tried Appellant the first time granted a new trial and that the judge who tried him the next time sentenced Defendant to only sixty days suggests that we are not the only ones unimpressed with the case as made against the Defendant.

The case is affirmed, but without prejudice to the right of Defendant to apply within thirty days of the receipt of the mandate to the lower Court for a suspension, or reduction of sentence.

AFFIRMED."

### **Questions Presented**

Whether a conviction for an alleged false claim of United States citizenship shall be permitted to stand when:

1. A domiciled resident and property owner of the State of Texas is by the Constitution and laws of that State required to purchase a poll tax, irrespective of whether such person is a citizen or not;

2. The Circuit Court of Appeals finds as a fact that "the evidence leaves us with more dubiety than certainty \* \* \*";

3. It is the fundamental law of the land that to justify a conviction in a criminal case, the person so charged must be found guilty, "beyond a reasonable doubt."

4. There is no relevant evidence from which the Trial Court could rightly find that because Petitioner purchased and possessed a Poll Tax Receipt, coupled with the alleged presenting of such receipt, constituted representation of the Petitioner to be a citizen;

5. The evidence was as consistent with innocence as with guilt; and

6. The circumstantial evidence did not exclude every reasonable hypothesis of innocence.

### **Reasons Relied Upon For the Allowance of the Writ**

1. There is here presented for decision an important question of Federal law which has not been, but should be, settled by this Court. Whether a finding of the Circuit Court of Appeals that "the evidence leaves us with more dubiety than certainty, \* \* \* " justifies the affirmation of a judgment in a criminal case.

2. Because the questions urged by Petitioner raise an im-

portant question with reference to the sufficiency of evidence on which the guidance of this Court will be of benefit to all inferior Federal Courts.

3. Because the Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law in a manner which conflicts with the decisions of this Honorable Court, and of other circuits, notably those of the Supreme Court of the United States in *WARSZOWER v. U. S.*, 312 U.S. 342; *U. S. v. CLASSIC, ET AL.*, 313 U.S. 299; *FOTIE v. U. S.* (8 Cir.), 137 Fed. (2d) 831, and *BENN v. U. S.* (9 Cir.), 21 Fed. (2d) 962.

In these cases the well established rule was followed, that guilt can only be determined by showing that a Defendant has been so found "beyond a reasonable doubt."

In the case at bar for the first time, a qualification has been written into that rule in that the Circuit Court of Appeals affirmed the judgment of the Trial Court notwithstanding the fact that the Circuit Court found as a fact that "the evidence leaves us with more dubiety than certainty, \* \* \* " "The case is suggestive of a witch hunt \* \* \* " " \* \* \* we are not the only ones unimpressed with the case as made against the Defendant." No such limitation has heretofore been stated in any decided case, and it is contrary not only to the holdings in the cases cited, but destroys the purpose and functions of an appeal, and violates every concept of justice.

4. Because the case involves a question of gravity and general importance which it is in the public interest to have decided by the Court of last resort. The question involved is far reaching in its application and importance. The decision of the Circuit Court of Appeals affects every person charged with a criminal offense in Federal Court, and constitutes a challenge to the integrity of our judicial processes.

5. A review of the decision of the Court below is of importance in the administration of the Section of the Naturalization Act of which this Petitioner stands charged with a violation.

6. Because of the importance in the administration of justice of the problem raised.

### Prayer

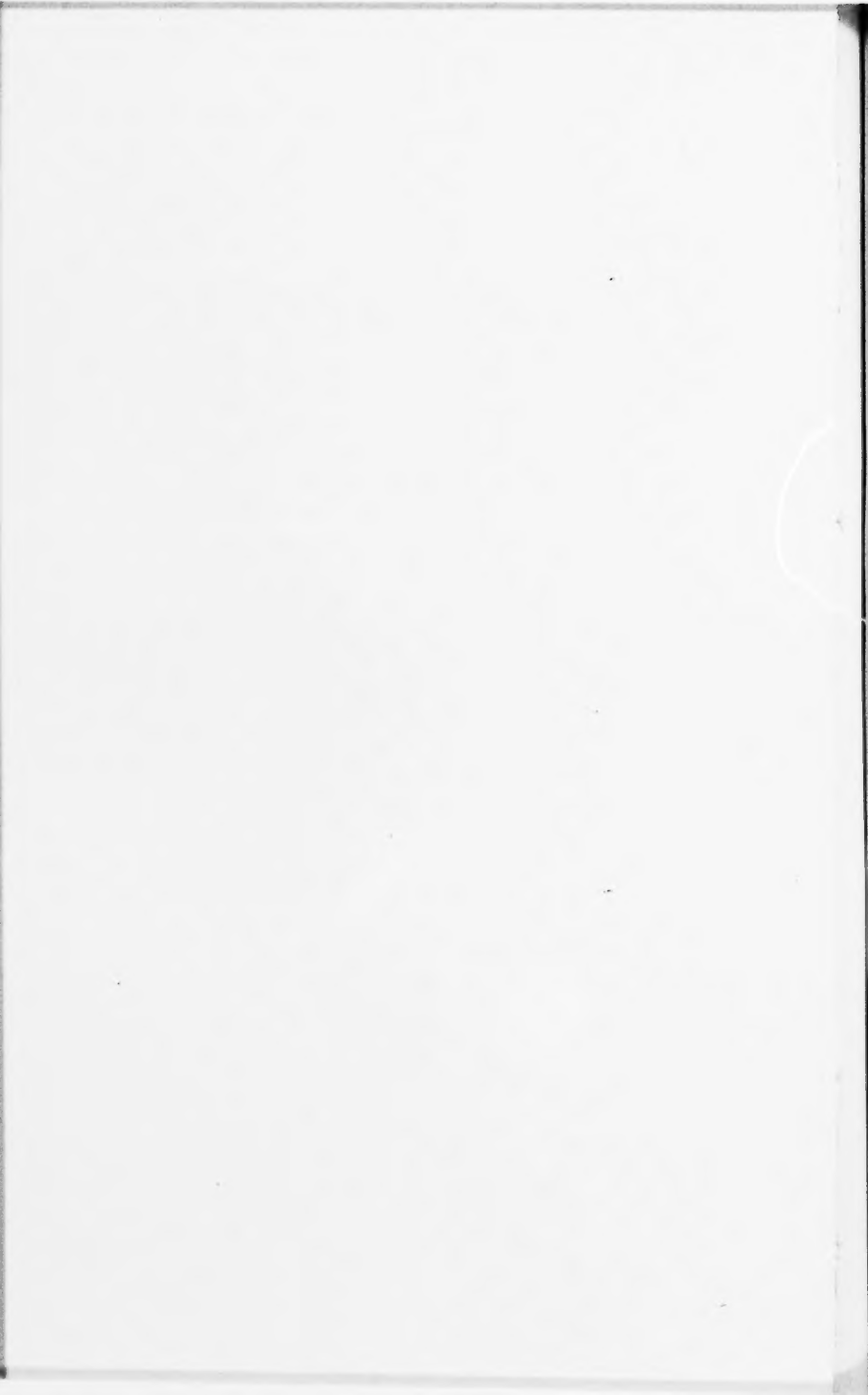
WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket 11,018, Paul Franz Frederick, Appellant, v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this Court; and for such further relief as this Court may deem proper.

PAUL FRANZ FREDERICK,  
*Petitioner,*

By  
BERNARD A. GOLDING,  
*Counsel for Petitioner*

February       , 1945.





IN THE  
SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM, 1944

---

No. \_\_\_\_\_

---

PAUL FRANZ FREDERICK, *Petitioner*,  
v.  
UNITED STATES OF AMERICA, *Respondent*

---

**BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

---

**Opinion of the Court**

The opinion of the Court below has not been officially reported. It is dated December 15th, 1944, and appears at pages 214, 215 of the Record. On page 7 the decision is set out in full.

**Statement of the Case**

This has already been stated in the preceding Petition on pages 1-6, which is here adopted and made a part of this brief. The facts and issues therein stated will be elaborated only to the extent thought helpful.

## Specifications of Error

*The Circuit Court of Appeals erred:*

### I.

In holding that the conviction was supported by sufficient evidence, particularly because of that Court's finding of fact that " \* \* \* THE EVIDENCE LEAVES US WITH MORE DUBIETY THAN CERTAINTY."

### II.

In holding that this conviction was not contrary to law, particularly in view of that Court's holding " \* \* \* "WE ARE NOT THE ONLY ONES UNIMPRESSED WITH THE CASE AS MADE AGAINST THE DEFENDANT."

### III.

In holding that the Government, by competent and relevant proof, discharged its burden of proving every essential element of the crime charged by substantial evidence excluding every other hypothesis than that of Petitioner's guilt, notwithstanding its finding that "THE CASE IS SUGGESTIVE OF A WITCH HUNT \* \* \* "

### IV.

In holding that the Government discharged its burden of clearly establishing that Petitioner was guilty of a fraudulent representation concerning a material fact with knowledge of its falsity and with intent to deceive.

### V.

In holding that this conviction was sustained by competent and relevant proof beyond a reasonable doubt, notwithstand-

ing the Circuit Court found, as a fact, \* \* \* "THE EVIDENCE LEAVES US WITH MORE DUBIETY THAN CERTAINTY."

#### IV.

In holding that this conviction was not obtained by the use of admissions before the alleged crime,—was corroborated—and that the necessary elements of the charge were clearly established.

#### Summary of Argument

1) The indisputable evidence shows that Petitioner purchased a Poll Tax Receipt for himself and wife on December 27th, 1941, as was required of all property owners, irrespective of citizenship or lack of it, under the Constitution and Statutes of the State of Texas, and in so doing he was but fulfilling a mandatory requirement of the laws of that State.

2) PETITIONER, IN PRESENTING THE POLL TAX RECEIPT (IF HE DID), DOES NOT CONSTITUTE, AS A MATTER OF LAW, REPRESENTATION OF CITIZENSHIP.

The evidence clearly shows that Petitioner, assuming that he actually presented a Poll Tax Receipt (which the Court below unequivocally states "LEAVES US WITH MORE DUBIETY THAN CERTAINTY.") did not constitute a WILLFUL INTENT TO REPRESENT HIMSELF TO BE A CITIZEN.

3) PROOF IS INSUFFICIENT.

The evidence in this record, as to both Counts, fails utterly to show that Petitioner in the purchase of the Poll Tax Receipt violated any law, and that he at any time, ever represented himself to be a citizen, the absence of which leaves no

room for doubt that the conviction on both Counts, is not sustained.

4) CONVICTION ON BOTH COUNTS IS NOT SUSTAINED BY COMPETENT PROOF BEYOND A REASONABLE DOUBT.

The Circuit Court held (R. 214-215), that "*The case is suggestive of a witch hunt*" \* \* \* "*The evidence leaves us with more dubiety than certainty.* \* \* \* " "*we are not the only ones unimpressed with the case as made against the Defendant.*", that being so, the conviction is not justified since the proof did not exclude every reasonable hypothesis of innocence, and proof of guilt *beyond a reasonable doubt* is lacking.

5) UTTER LACK OF EVIDENCE.

The evidence in the record fails utterly to show that Petitioner violated the Statute in question, or any other law. There was no evidence of any kind, either direct or indirect, that Petitioner ever represented himself to be a citizen. The affirmative evidence shows that he registered as an alien on December 5th, 1940 (R. 83), and as an enemy alien, on February 12th, 1942 (R. 90-91). No shred of evidence indicated "guilt" by Petitioner. The record wholly fails to sustain the conviction.

## ARGUMENT

### Point I

**The interpretation of Title 8, Sec. 746, Subdiv. 18, presents an important question which should be settled by this Court.**

Petitioner was indicted for violation of Title 8, Sec. 746,

Subdiv. 18, in that he "represented" himself to be a citizen of the United States for the purpose of obtaining a Poll Tax Receipt, required by the Constitution and Statutes of the State of Texas (Arts. 2959-2977, 7046, VERNON'S CIVIL STATUTES OF THE STATE OF TEXAS ANNOTATED). By motion timely made during the course of the trial (R. 8-11), adverse ruling on which was excepted to (R. 11-12) and assigned as error (Ass. 2, 7, 8, 9, 10, R. 30-32), Petitioner challenged the interpretation of the Statute on which the indictment rested. Petitioner contended that as owner, jointly with his wife, of property in the State of Texas, he was required, under the laws of that State to purchase a Poll Tax Receipt, irrespective of his citizenship. That the possession of such Poll Tax Receipt, and the procurement thereof, constituted a mere compliance with the laws of the State of Texas, and evidence of his having purchased a Poll Tax Receipt. He further contended that the mere possession of such Poll Tax Receipt did not, as a matter of law, constitute "Representation" that he was a citizen of the United States.

This purchase, in compliance with the State laws of Texas, has now been adjudicated criminal on the ground that the procurement and possession of Poll Tax Receipt is tainted, and constitutes a false "Representation" as to citizenship. The representation (if such was made), it will be observed, had nothing whatever to do with the requirement of the Petitioner to secure a Poll Tax Receipt under the laws of the State of Texas.

## Point II

**The issue raised by the challenge of the sufficiency of the evidence of "representation" warrants review by this Court.**

We freely acknowledge that ordinarily this Court will not

review decisions of Circuit Courts on the sufficiency of the evidence—at least where no Constitutional issue exists. We urge, however, that the unusual circumstances present in this cause are sufficient to justify a departure from that practice.

The Court below finds as a fact that "The case is suggestive of a witch hunt," "the evidence leaves us with more dubiety than certainty," " \* \* \* we are not the only ones impressed with the case as made against the Defendant," but affirms the conviction in utter disregard of the law.

The Government seeking conviction on the First Count which involves the purchase of the Poll Tax Receipt (Dec. 27th, 1941) relied on but a single witness. The Deputy Tax Collector of Harris County, Texas, Mrs. Bennita Blissard, stated that people were "ten or twelve feet deep at the windows and there are about fifteen windows there, you can imagine how noisy it is," at the time Petitioner presented himself, to purchase Poll Tax Receipts for himself and wife. She says, "At this point I didn't say, are you a Naturalized citizen of the United States. I merely raised my eyes and said 'You are naturalized?', and he said 'yes'." But in the next question this witness says that when she asked Petitioner the question "you are naturalized?" "he nodded his head" (R. 46). A neighbor who states that she has known Petitioner for eight years, and has often visited in his home, says that she *knows* the Defendant "has difficulty hearing at times, due to an impediment in his hearing." "He is not entirely deaf, but he has great difficulty in hearing" (R. 198, 204). This deafness is quite obvious in the record, he does not hear his attorney's questions, and has to have them repeated (136, 140, 145). Nowhere else in the testimony does anybody say that Petitioner ever represented himself as a citizen of the United States. On the contrary, numerous witnesses testified that he has always told them he was *not* a citizen. He registered as an alien on December 27th, 1941 (R. 83), and

as an enemy alien on February 12th, 1942 (R. 90-91). The statement of witness Marks (R. 96-97) that Petitioner once told him that he (Petitioner) was a citizen, and exhibited a Poll Tax Receipt to prove it, is obviously a mistake on the part of Marks. This, because witness Marks alleges this to have occurred April 3rd, 1941, whereas, the Government admits that the first Poll Tax Receipt Petitioner ever bought was December 27th, 1941.

The entire weight of the conviction on the First Count rests on the testimony of witness Blissard. A fair and impartial scrutiny of her testimony necessitates the conclusion that it looks more like her representing Petitioner as a Naturalized Citizen to save herself trouble, than Petitioner representing himself as a citizen. Apparently she put him down as naturalized in order to save time and trouble. Or at the very worst, she did ask him whether he was naturalized, and he did not hear or understand what she was saying. But against her testimony are these facts:

(a) She would have to testify as she did so as not to seem inefficient as Deputy Tax Collector;

(b) She would have to testify as she did so as to avoid showing herself to be a perjurer in the former trial;

(c) She did not know Frederick personally and could not have identified him in a crowd (R. 53-58). The whole affair occurred over two years prior to the trial; yet she remembered all the circumstances of her writing a Poll Tax Receipt for this unknown man. Such a memory is incredible!

The fact that he purchased a Poll Tax Receipt, the mere buying of it, is of no significance. Petitioner's statement that a tax official had told him he had to buy it (R. 139, 148, 149) is undisputed. Furthermore, even an alien is required to buy a Poll Tax in the State of Texas, if he owns property in that State.

The fact that the record leaves room for doubt that wit-

ness Blissard actually understood Petitioner to say that he was a citizen, or whether Petitioner, who is slightly deaf, actually heard witness Blissard's question as to his naturalization, if she asked it, adds strength to the finding of the Circuit Court of Appeals that "the evidence leaves us with more dubiety than certainty."

A fair and impartial survey of all of the testimony necessitates the conclusion that the testimony did not exclude the hypothesis of innocence. Therefore, proof of guilt beyond a reasonable doubt was lacking and Petitioner's Motion for a directed verdict on this expressed ground (R. 8-11) should have been sustained. The exception to this ruling (R. 12) was duly preserved (Ass. 2, 7, 8, 9, 10; R. 30-32).

The law on the subject is clear and uniformly adopted. Recent applications are found in *WARSZOWER v. U. S.*, 312 U.S. 342; *U. S. v. CLASSIC, ET AL.*, 313 U.S. 299; *FOTIE v. U. S.* (8 Cir.), 137 Fed. (2d) 831; *U. S. v. SILVA* (2 Cir.), 109 Fed. (2d) 531; *RIVERA v. U. S.* (1 Cir.), 57 Fed. (2d) 816, and *BOATRIGHT v. U. S.* (7 Cir.), 105 Fed. (2d) 737.

The Second Count in the indictment sought to show that Petitioner "represented" himself as a citizen by actually voting in the School Trustee Election of April 4, 1942, in Houston, Texas. Again, the Government relies on a single witness to establish this charge. This witness, Mrs. Blevins, says that Petitioner *never* represented to her that he was a citizen (R. 77-79). That Petitioner merely handed the Poll Tax Receipt to her (R. 184-185). Nobody else saw Petitioner at the Polls that morning; nobody else saw him vote. Petitioner himself never said that he voted. He says only that "my wife says I voted at an election for School Trustees about one year ago and I guess I did, held at Jack Price's Filling Station on Market Street" (R. 109).

The charge is *not* that he *voted unlawfully*, but that he represented himself as a citizen unlawfully. There is no testi-

mony that Petitioner did anything else than present his Poll Tax. He did not represent himself as anything at all. As to whether Petitioner presented himself to vote, we have only Mrs. Blevins' word that he was there. Nobody else saw Petitioner there, and he never admits that he was there or was not there. He says that he "doesn't recall," but that his wife says he was there (R. 154-156). Petitioner merely states that he brought a lot of people there to vote, and doesn't remember whether he voted or not. (The election was held two years before the trial.) Witness Blevins and Petitioner were on opposite sides in a bitter neighborhood squabble and she may be trying to hurt him out of pure maliciousness (R. 178-179; 74). The Poll Tax receipt showing he voted (if he did) was never presented in evidence; and there is no evidence except witness Blevins' word that Petitioner actually did appear to vote at this election.

In the absence of all direct evidence that Petitioner presented his Poll Tax receipt at the School Trustee Election, except the word of Mrs. Blevins (who is admittedly a political enemy of Petitioner) it is not certain that Petitioner actually voted in the School Trustee election of April 4, 1942.

The pertinent portion of the Statute for the purpose of this inquiry is as follows:

"It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not

\* \* \* knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States."

This Statute obviously contemplates the presence of wilfulness before conviction can lawfully be obtained. And

"wilfulness" necessarily implies a purposeful design to commit an act with fraudulent or evil purpose. *U. S. v. MURDOCK*, 290 U.S. 389, 394. Also, *SPIES v. U. S.*, 317 U.S. 492, 497, 498.

It is elementary that criminal statutes may not be stretched so as to embrace acts and conduct not within their scope. And no such thing exists as a constructive crime. *FASULA v. U. S.*, 272 U.S. 620, 629.

The Government in the Court below admits that "it is not unlawful to buy a Poll Tax or to vote, but that is not what this case is about. The essence of this case is the unlawful claim to citizenship by an alien for any purpose." (Appellee's brief, Circuit Court of Appeals, page 9.)

It is respectfully submitted that no proper inference of guilt is permissible under the record in this cause, and that the Circuit Court was eminently correct in holding "the evidence leaves us with more dubiety than certainty." And we might add that said Court stated the crux of this prosecution in its holding, "The case is suggestive of a witch hunt." For the record in this cause, we submit, demonstrates that it is just another unfortunate illustration of ancestry being substituted for the essential ingredients necessary to a lawful conviction.

### Point III

**The refusal of the Circuit Court of Appeals for the Fifth Circuit to follow decisions in this Court and in other circuits on the necessity for applying the fundamental law of the land, in criminal cases, requires review by this Court.**

The Circuit Court in this cause has expressly refused to follow the fundamental law of the land, to-wit: That before Petitioner can be found guilty upon either Count in the in-

dictment every material allegation must be proved "beyond a reasonable doubt."

The Circuit Court has stated without equivocation that "The case is suggestive of a witch hunt \* \* \*"; "the evidence leaves us with more dubiety than certainty"; "we are not the only ones unimpressed with the case as made against the Defendant," that Court having expressly found that the evidence created more doubt than certainty, it was the duty of the Court below to reverse such conviction. This we believe to be the proper view, the only view consonant with those high principles of justice which the Federal Courts are charged to administer.

The Circuit Court of Appeals in sustaining the conviction of Petitioner notwithstanding that it found "the evidence leaves us with more dubiety than certainty" departed from our long established traditions of Anglo-American Law, which require in every case that it be proven that a crime was actually committed, and that his guilt is established "beyond a reasonable doubt".

See: *U. S. v. CLASSIC, ET AL.*, 313 U.S. 299; *WARSZOWER V. U. S.*, 312 U.S. 342 and *FOTIE v. U. S.* (8 Cir.), 137 Fed. (2d) 831.

The decision of the Circuit Court is in conflict with the sound and universal rule, that before a person may be found guilty, guilt must be established "beyond a reasonable doubt." The decision in this case is indeed the first expression of a rule of law never even suggested before. We confess our inability to find any other cases, State or Federal, which throw light on this problem. Therefore, a review by this Court is essential lest the Patent uncertainty created by the decision below result in confusion. The expressed findings embodied in the decision of the Circuit Court relieves us of further comment in the premises. The decision speaks for itself! To our Courts, the refuge of weakness and innocence, we look with hope and

joy. It has never been decided by any Court that a criminal conviction will stand when "the evidence leaves us with more dubiety than certainty." Certainly, this is not the voice of Justice. And it is not mere rhetoric to predict that should this decision stand, future generations may justly pronounce it a relapse into the realm of Cimmerian darkness.

This decision negates every segment of our Democratic institutions, and strikes a very serious blow to the Constitutional rights of defendants in criminal cases. It is highly dangerous to disregard such rights at any time. At this particular time of our history, to abandon them would be suicidal.

For the reasons before stated, Petitioner earnestly urges that this Court grant its Writ of Certiorari directed to the Circuit Court of Appeals for the Fifth Circuit and relieve this Petitioner from the unjust burden to which he is subjected by the terms of the judgment entered against him by said Court.

### Conclusion

It is respectfully submitted that the Writ of Certiorari prayed for in the Petition should issue.

Respectfully submitted,

BERNARD A. GOLDING,  
432 Niels Esperson Bldg.,  
Houston, Texas,  
*Counsel for Petitioner*

9

# INDEX

---

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statute involved .....	2
Statement .....	2
Argument .....	8
Conclusion .....	11

## CITATIONS

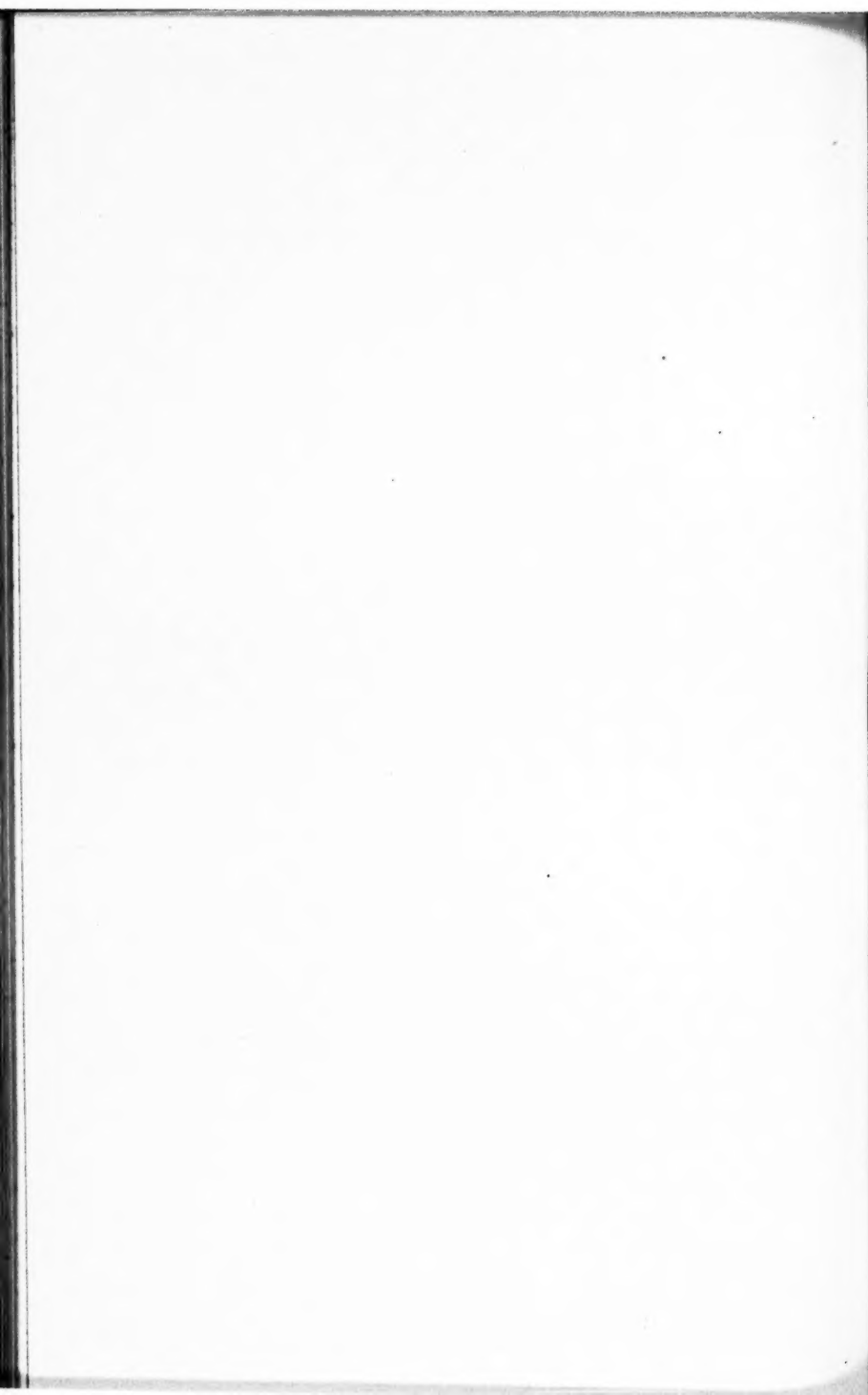
### Cases:

<i>Hirabayashi v. United States</i> , 320 U. S. 81 .....	10
<i>United States v. Frederick</i> , 50 F. Supp. 769 .....	3

### Statutes:

Alien Registration Act (8 U. S. C. 451 <i>et seq.</i> ) .....	4
Title I, subch. III, § 346 of the Nationality Act of 1940, 54 Stat. 1163 (8 U. S. C. 746) .....	2

(I)



# In the Supreme Court of the United States

OCTOBER TERM, 1944

---

No. 930

PAUL FRANZ FREDERICK, PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT*

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

## **OPINION BELOW**

The opinion of the circuit court of appeals (R. 213-214) has not yet been reported.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered December 15, 1944 (R. 214), and a petition for rehearing (R. 215-219) was denied January 15, 1945 (R. 220). The petition for a writ of certiorari was filed February 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

#### QUESTION PRESENTED

The sole question presented is whether there is sufficient evidence to sustain petitioner's conviction.

#### STATUTE INVOLVED

Title I, subch. III, § 346 of the Nationality Act of 1940, 54 Stat. 1163 (8 U. S. C. 746), provides in part:

(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—

\* \* \* \* \*

(18) Knowingly to falsely represent himself to be a citizen of the United States without having been naturalized or admitted to citizenship, or without otherwise being a citizen of the United States.

\* \* \* \* \*

(d) Any person violating any provision of subsection (a) of this section shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

#### STATEMENT

On March 15, 1943, petitioner, an alien, was indicted in the District Court of the United States for the Southern District of Texas (Case No. 8534) in two counts charging violations of

Title I, subch. III, § 346 of the Nationality Act of 1940. The first count alleged that on or about December 27, 1941, petitioner knowingly, wilfully, and unlawfully represented himself to be a citizen of the United States before a deputy collector and assessor of taxes of Harris County, Texas, "in applying for a poll tax"; and the second charged that he also misrepresented himself to be a citizen on July 25, 1942, before an election judge of Harris County in applying for a ballot to vote. (R. 3-4.) After a trial on this indictment by the court without a jury he was convicted on the first count and acquitted on the second (*United States v. Fredrick*, 50 F. Supp. 769; see also Pet. 2). Thereafter, the trial judge granted him a new trial on the first count as the result, apparently, of a letter to the judge by a Mrs. Blissard, the Government's principal witness as to that count (see R. 12-13, 21-22, 48; Pet. 3).<sup>1</sup>

On September 9, 1943, a second indictment in one count was returned against petitioner (Case No. 8690) charging that on April 4, 1942, he knowingly, wilfully, and unlawfully misrepresented himself to be a citizen in applying to an election judge for a ballot to vote in an election for school trustees (R. 5-6).

On April 3, 1944, the first count of Indictment 8534 and the single count of Indictment 8690, were

---

<sup>1</sup> The proceedings of the first trial are not included in the record.

consolidated for trial (R. 6) and at petitioner's request, and with the approval of the court and the United States Attorney, he was tried by the court without a jury (R. 6-7). The court found petitioner guilty upon both counts (R. 12-13) and sentenced him to imprisonment for a term of sixty days upon each, the sentences to run concurrently (R. 21-23). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the convictions were affirmed, "but without prejudice to the right of Defendant to apply within thirty days of the receipt of the mandate in the lower Court for a suspension, or reduction, of sentence" (R. 213-214).

The evidence relating to the two counts involved in this case is, in summary, as follows:

Petitioner was born in Germany in 1899. He came to this country in 1923 (R. 83, 136, 146) and was an alien at all times material herein (R. 83-84, 90-92).<sup>2</sup>

On December 27, 1941, petitioner paid at the office of the Assessor and Collector of Taxes, Harris County, Texas, a local property tax upon property registered in his wife's name (R. 44, 47-48, 53, 55-58, 139, 148, 149). He then offered to pay.

---

<sup>2</sup> Petitioner registered as an alien with the Department of Justice, Immigration and Naturalization Service, under the Alien Registration Act (8 U. S. C. 451 *et seq.*) on December 5, 1940 (R. 83-85), and on February 12, 1942, he again indicated his alien status in applying for an enemy alien certificate of identification (R. 90-91). On January 21, 1943, petitioner filed a petition for naturalization (R. 92).

and paid, two poll taxes, one for himself and one for his wife, a native-born citizen of the United States (R. 44, 45, 51). This was the first time he had ever paid a poll tax for himself, although he had paid the property tax and a poll tax for his wife in prior years (R. 57-58, 148).<sup>3</sup> He was admittedly aware that he could not vote unless he paid a poll tax (R. 157), and claimed to have been under the impression that a poll tax receipt would entitle him to vote "in bond issues or trusteeship elections," but not in national elections or in "primaries" (R. 154-156).

Mrs. Blissard, the deputy tax collector (R. 41) who prepared the poll tax receipt for petitioner (R. 47), could not identify petitioner solely on the basis of his appearance before her on December 27, 1941 (R. 53, 58), and could not "say exactly what I did in that special case" (R. 52), but stated that she "must have asked him" the various questions necessary to supply the information called for by the poll tax receipt (R. 52, 53). Mrs. Blissard admittedly asked petitioner his name, address, age, length of residence in the state, county and city, occupation and place of

---

<sup>3</sup> Both citizens and aliens are required to pay a poll tax in Texas if they own property in the state (R. 53-54, 139, 148, 149).

Petitioner testified: "\* \* \* I rendered my property at the same time I paid the tax and it was told me that I had to buy a poll tax before I could render my property and pay the tax" (R. 139, 148). The record shows that the property in question was entirely in the name of petitioner's wife (R. 56, 148).

birth (R. 45-46, 102-103, 139, 149). With reference to his place of birth, petitioner admittedly replied that it was Germany (R. 46, 47, 139). She then, she testified, asked him whether he was "naturalized" and he replied in the affirmative (R. 46).<sup>4</sup>

On about April 4, 1942 (R. 61), petitioner and his wife appeared at Price's Service Station, at an election of school trustees (R. 120, 144). Petitioner there presented to a Mrs. Blevins, a poll tax receipt (R. 62, 64, 65) which indicated that he was a naturalized citizen of the United States (R. 65-66, 79). Mrs. Blevins had "a poll list," and when petitioner presented to her the poll tax receipt which "said he was a naturalized citizen" (R. 65-66, 68-69; see also R. 184-185), she wrote his name "on the papers that I was supposed to write it on" (R. 64). She admitted, however, that petitioner never directly stated to her that he was a citizen of the United States (R. 77, 78, 80).

Petitioner testified that he "couldn't say if I did or if I didn't" vote in the election on April 4, 1942, that he was interested in its outcome and brought some people there, and that his wife had

---

<sup>4</sup> Mrs. Blissard testified that petitioner "said he was" when she asked whether he was naturalized (R. 46). On re-cross-examination she testified that petitioner said "yes" in answer to her question, "You are naturalized?" (R. 210), and, again, that in answer to this question, petitioner "nodded his head" (*ibid.*).

told him she thought he did vote on that occasion (R. 144-145, 154, 156). At his previous trial (see p. 3, *supra*), petitioner admitted that he had voted at this election (R. 155, 156).<sup>5</sup>

In a written statement dated January 19, 1943 (R. 109), petitioner stated that "my wife says I voted at an election for school trustees about one year ago and I guess I did, held at Jack Price's filling station on Market Street at Cloverleaf Farm Addition. I did not want the people in my community to know that I am not a citizen because of my family. When I have been asked about whether I am a citizen I have not said I am or that I am not. I have only voted on the two occasions, that is in the school trustee election mentioned above and in the primary election in July 1942" (R. 109).<sup>6</sup>

---

<sup>5</sup> Petitioner also admitted in a statement signed on January 16, 1943, that he attended a "primary election" in July 1942 at Galena Park School. Petitioner drove there with his wife and when he "went in I presented my poll tax receipt & was furnished a ballot. I took the ballot over to the voting table and voted. I erased my voting number on the ballot. I gave the ballot to the man standing beside the ballot box and asked him not to stamp it. He still had the ballot on the table when I left. My wife and Mr. Blevins also voted and we left" (R. 102-105; see also R. 170-171).

<sup>6</sup> While petitioner at first testified that the last quoted sentence was added to his written statement after he had signed it (R. 141) and thereafter (R. 157-159) indicated that the written statement did not accurately represent his oral statements upon which it was based, his own testimony as a whole negates his earlier assertions (R. 157-161, 164-166).

While it appears that petitioner was somewhat hard of hearing (R. 145, 206-207), petitioner, testifying in his defense, conceded that he answered all the questions of Mrs. Blissard, the tax collector, on December 27, 1941, except that relating to his citizenship status (R. 139-140, 149). He denied, however, that he told Mrs. Blissard that he was a naturalized citizen, or that he was asked any question concerning his citizenship status (R. 138-140, 149). Petitioner denied also that he ever told Mrs. Blevins that he was a citizen of the United States (R. 138, 153), and testified that he had informed both Mr. and Mrs. Blevins that he was not a citizen of the United States and that "I was making my final papers" (R. 143, 153). The final papers were not filed, however, until January 21, 1943 (R. 92). Petitioner also testified that he did not remember ever having voted in this country (R. 160).

Several witnesses testified that petitioner's reputation for honesty and truthfulness was good (R. 151, 194; see also R. 175-176, 199, 204-205), and other witnesses testified that he never represented to them that he was a citizen of the United States (R. 189, 191, 194, 196, 203-204).

#### ARGUMENT

This case has become colored by the injection of issues wholly irrelevant to the one actually involved. Whether petitioner was entitled or not to purchase a poll tax receipt (see Pet. 14-15), he

was not prosecuted for that. The prosecution may have developed, as he indicates, out of a "bitter neighborhood squabble" (Pet. 19) and thus have been, as the circuit court of appeals states, "suggestive of a witch hunt" (R. 214), but that does not warrant the overturning of petitioner's conviction if there was enough evidence. The alleged animosity of the Government's principal witnesses (Pet. 17, 19), although evidently it was through the intercession of one of them that petitioner was granted a new trial on one of the counts (Pet. 3-4), is also irrelevant on appellate review. Further, it is immaterial under the statute whether an offender gains an advantage from his misrepresentation of citizenship or has some ulterior motive in making the misrepresentation (Pet. 13, 15, 17, 19), for the statute provides for penalization merely if the misrepresentation is "knowingly" made (*supra*, p. 2). And, while the opinion of the circuit court of appeals leaves little doubt that those judges would not have convicted petitioner if they had been in the place of the trial judge, since they felt that the evidence left them "with more dubiety than certainty", they nevertheless felt impelled to state, after their examination of the evidence, that "we are unable to say that the verdict of the judge \* \* \* was not supported by sufficient evidence" (R. 214). This was not, as petitioner insists (Pet. 20-22), a negation of the "reasonable doubt" rule; it was but the recognition of the principle that an

appellate court may not substitute itself for the fact-finding instrumentality, the jury, or the judge in a jury-waived case; that the appellate function is merely to ascertain whether there was enough evidence of substantiality to permit the fact-finder to embark upon the determination of guilt or innocence. The question in this case is, therefore, simply whether the evidence authorized such a determination.

The litigation in the trial court turned upon the question of the credibility of the testimony pro and con. The trial judge, of course, saw and heard the witnesses. It is evident that he believed the testimony adduced by the Government. There can be no doubt that the evidence, with the inferences which may properly be drawn therefrom, furnished a substantial evidentiary basis for his decision that on two occasions petitioner knowingly misrepresented himself to be a naturalized citizen.<sup>7</sup>

While the evidence showed at least a technical violation of the statute by petitioner on two occasions, the permission accorded by the circuit court of appeals to petitioner to seek, upon remand, reduction or suspension of sentence (R. 214), was, it seems to us, not inappropriate in view of the circumstance that petitioner may have been the victim of a neighborhood squabble.

---

<sup>7</sup> Since petitioner's 60-day sentences are to run concurrently, his conviction is, of course, not vulnerable if he was properly convicted upon either count. *Hirabayashi v. United States*, 320 U. S. 81, 105, and cases cited.

## CONCLUSION

While the case is not an attractive one, we cannot say the decision below is incorrect, and we therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,

*Solicitor General.*

TOM C. CLARK,

*Assistant Attorney General.*

W. MARVIN SMITH,

*Special Assistant to the Attorney General.*

ROBERT S. ERDAHL,

WILLIAM STRONG,

*Attorneys.*

MARCH 1945.